

***WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW*, MARK TUSHNET (PRINCETON: PRINCETON UNIVERSITY PRESS, 2008)**

I. INTRODUCTION

Mark Tushnet is one of the United States' most influential constitutional theorists. Like many of his contemporaries, he is a skeptic about constitutionalized rights, and in particular about the virtues of judicial supremacy. This runs counter to the long liberal tradition in American legal and political thinking that has celebrated the U.S. Constitution as the hallmark of the country's exceptionalism. The skeptics, though, are having their day. Those, like Tushnet, who come to their doubts from the political left, are most certainly influenced by the marked swing to the right in recent years of the American judiciary, especially the U.S. Supreme Court. They view the political branches of the state as offering better prospects for progressive change in American society. Along with Larry Kramer,¹ Tushnet is a leading exponent of the idea of "popular constitutionalism," which holds that the electorate and its legislators should reclaim authority over the interpretation of constitutional rights from the judges. He has developed and defended this position in a series of articles and books of which *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law*² is the most recent.

II. THE ARGUMENT

The first of three parts of the book starts with an engaging defence of the value of comparative law to constitutional studies. In making this point, Tushnet is responding to biting criticism by U.S. Supreme Court Justices Scalia and Thomas of using foreign jurisprudence to aid in interpreting the U.S. Constitution. Tushnet replies that, at the very least, comparativism can be justified on the basis that "more knowledge is generally better than less."³ He believes it can be more valuable than that, while acknowledging that many comparative studies are merely descriptive of how different legal systems perform the same functions. Tushnet sets out an alternative contextual approach, which involves examining the institutional and doctrinal realities of the systems being compared, in order to identify meaningful differences in the answers they provide to legal problems.

This is the approach Tushnet brings to his study of Canadian law. He finds inspiration for his preferred model of constitutionalism in Canada's approach to judicial review under the

¹ Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford: Oxford University Press, 2004).

² Mark Tushnet, *Weak Courts, Strong Rights: Judicial Review and Social Welfare Rights in Comparative Constitutional Law* (Princeton: Princeton University Press, 2008) [Tushnet, *Weak Courts, Strong Rights*]. The book in fact draws freely from 13 articles written by Tushnet between 2001 and 2006. A complete list can be found in Mark Tushnet, "Acknowledgments" in Tushnet, *Weak Courts, Strong Rights*, xv. Several of the articles deal in part or whole with issues in Canadian constitutional law, including Mark Tushnet, "Judicial Activism or Restraint in a Section 33 World" (2003) 53 U.T.L.J. 89; Mark Tushnet, "Interpretation in Legislatures and Courts: Incentives and Institutional Design" in Richard W. Bauman & Tsvi Kahana, eds., *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge, U.K.: Cambridge University Press, 2006) 355.

³ Tushnet, *Weak Courts, Strong Rights*, *ibid.* at 4.

Canadian Charter of Rights and Freedoms.⁴ Tushnet views Canada as having weaker courts and stronger social and economic rights than the U.S., and the difference appeals to him. Canada is not the only source of Tushnet's comparative analysis, as he considers the recent experience of other recent Westminster converts to written bills of rights, such as the United Kingdom,⁵ New Zealand, and South Africa. In drawing lessons from these and other jurisdictions, Tushnet displays a keen appreciation for the workings of parliamentary government.

Tushnet's central idea is that "weak-form" judicial review presents distinct advantages over the "strong-form" review that characterizes American constitutionalism, especially when it comes to enforcing social welfare rights. By weak-form review, he means any system in which majorities acting through legislatures can have the "last word" on reasonable interpretations of "rights" statements in constitutional documents. Strong-form review is characterized by courts having the last word on these questions.⁶ Those familiar with the extensive discussion of the dialogue theory of *Charter* review will know immediately why Tushnet views Canada as falling on the better side of the strong-form/weak-form divide.

Tushnet makes two qualifications here. First, he does not view strong- and weak-form review as being mutually exclusive. Rather, they exist on a continuum described by the length of time that judicial interpretations of rights can be expected to survive. In weak-form review systems, mechanisms allow legislatures to overturn or modify judicial interpretations within a relatively short time frame. In strong-form systems, the process of overcoming judicial interpretations is largely in the hands of judges themselves and generally occurs (if it occurs at all) over a lengthy period. Second, weak-form review should not be confused with a deferential standard of constitutional review. Deference is difficult to combine with the very concept of constitutional review. Moreover, deference is an answer to a different question than that of who has final authority over constitutional meaning, going instead to the scope given by courts to legislators' interpretative efforts.

The middle portion of *Weak Courts, Strong Rights* contains an extended argument to the effect that there is little or no empirical evidence to show that legislators do a poorer job of interpreting constitutional rights than do judges.⁷ Much of the force of this position rests on the proposition that the open-textured terms in which constitutional rights are stated lend themselves to a broad range of possible interpretations over which reasonable people can

⁴ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [*Charter*].

⁵ With respect to the United Kingdom, Tushnet finds the *Human Rights Act 1998* (U.K.), 1998, c. 42 [*Human Rights Act*], which incorporates by reference the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [*ECHR*], into British law, as creating a form of constitutional review. Under the *Human Rights Act*, British courts are directed to construe domestic statutes in a way that makes them comply with *ECHR* rights or, if that is not possible, to issue a non-binding "declaration of incompatibility."

⁶ See Tushnet, *Weak Courts, Strong Rights*, *supra* note 2 at 21: "Courts exercise strong-form judicial review when their interpretive judgments are final and unreviewable."

⁷ When Tushnet refers to legislators' interpreting the provisions of a Constitution, he means that they engage in interpretive acts when they pass legislation. In other words, the statutes enacted by legislatures embody the judgments of legislators as to what is and is not constitutionally permissible. In this way, measuring judicial and legislative performance on constitutional interpretation involves measuring court decisions on the constitutionality of statutory provisions with those provisions themselves.

disagree. Tushnet implies, in fact, that there are relatively few ways in which elected lawmakers (or judges for that matter) can go terribly wrong.⁸ The problematic nature of this relaxed standard for evaluating the quality of constitutional analysis is returned to at a later point.

Tushnet challenges a host of common beliefs concerning the institutional and procedural weaknesses of legislatures as interpreters of the Constitution compared to courts — including that their members are elected, that they have strong incentives to favour majority interests, and that they are not obliged to give reasons for their decisions. Strangely, however, he does not comment on what may be the most significant methodological difference between courts and legislatures: the duty and practice of judges to operate through precedent. Even if one believes, as Tushnet does, that precedent does not dictate legal “solutions” to constitutional questions, the discourse of precedent is what courts contribute to the overall conversation in society about constitutional matters. To merely assimilate the discourse of judges and politicians seems to devalue that conversation.

In the third and last part of the book, Tushnet makes two broad claims. First, he argues that doctrinal efforts to read constitutional rights as being merely negative rights limiting what the state can do to individuals are inherently unsustainable. In the U.S., these efforts have gone under the name of the “state action doctrine.”⁹ The doctrine speaks to whether “background legal rules,” that is, common law rules of property, tort, and contract, can be made subject to constitutional standards. In Tushnet’s view, the state action issue is tantamount to the issue of whether a constitution protects social and economic rights.¹⁰ He engages in a detailed analysis to show that the state action doctrine in American jurisprudence has been deployed inconsistently and incoherently to different subject matters primarily as a device to keep courts from recognizing social and economic rights in the U.S. Constitution.

Tushnet contrasts the American experience with that of the Canadian judiciary’s treatment of s. 32 of the *Charter*.¹¹ In a cogent overview of the case law, Tushnet shows how the

⁸ Tushnet, *Weak Courts, Strong Rights*, *supra* note 2 at 95, summarizes his view in these terms:

Taking all these items together, I think the fair conclusion is this: There are surely differences between the conventional norms defining what a good judge does and what a good legislator does, but they are probably not night-and-day ones.

⁹ The “state action doctrine” is often traced to the *Civil Rights Cases*, 109 U.S. 3 (1883), in which the U.S. Supreme Court held that the 14th Amendment (U.S. Const. amend. XIV) applied only to state action, and not to acts of private parties. It was further discussed in *Shelley v. Kraemer*, 334 U.S. 1 (1948), dealing with whether the Constitution prohibited court enforcement of a restrictive covenant based on race. For further discussion, see Charles L. Black, Jr., “The Supreme Court 1966 Term: Foreword: ‘State Action,’ Equal Protection, and California’s Proposition 13” (1967) *Harv. L. Rev.* 69.

¹⁰ Tushnet, *Weak Court, Strong Rights*, *supra* note 2 at 191 [emphasis in original]:

The determination of the reasonableness of the distribution of wealth and economic power (or the application of heightened scrutiny to such issues) is precisely what the rejection of constitutionalized social and economic rights says is beyond the competence of courts. And yet, if the identification of restrictions on democratic self-rule is to be conducted meaningfully, the process-based settlement *requires* that courts make such judgments.

¹¹ Section 32(1) of the *Charter* states that: “[the] *Charter* applies (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.”

Supreme Court of Canada moved from an initially restrictive understanding of the *Charter*'s application to the common law in 1986¹² to a much broader understanding 16 years later.¹³ He argues that the existence of strong-form review in the U.S. renders this kind of development much more problematic. American judges and lawyers are preoccupied with the concern that should courts constitutionalize society's background rules, these will no longer be subject to reform or amendment by legislators.

Based on this review, Tushnet concludes that Canadian constitutional jurisprudence *does* in fact recognize positive social and economic rights. This conclusion may surprise many commentators who argue that the Supreme Court of Canada *should* do this but has continually declined to do so.¹⁴ Yet Tushnet is making a good point, and one that deserves more attention from critics of the Court on the left. He bases his argument largely on the Court's decisions in *Vriend v. Alberta*¹⁵ and *Eldridge v. British Columbia (A.G.)*.¹⁶ In the former, the Court extended statutory human rights protection to cover discrimination on grounds of sexual orientation. In the latter, the Court required governments to provide sign language interpreters as part of public health services. Both cases represent significant judicial recognitions of positive rights in the Constitution.

Tushnet's second proposition is that weak-form judicial review is better able than strong-form review to develop and enforce social rights. In general terms, weak-form review is better at addressing the problem of courts' institutional capacity to make orders in social policy areas, because it recognizes that constitutional interpretation is dialogic and prone to imperfection. With weak-form review, legislators have alternatives to compliance or disobedience where they strongly disagree with judges' rulings. This acts as a safety valve, saving a system from the kinds of stresses that occur when legislators act in a subversive fashion to undermine those decisions.

Tushnet also argues that enforcement of social rights is at least as likely to follow from "weak remedies" as from strong ones. He cites examples from different jurisdictions of seemingly weak judicial remedies that in his view hold out good prospects of causing legislators to act as the courts wish them to. These include the merely declaratory orders with respect to social rights permitted by the Irish Constitution and the South African Constitutional Court's decision to shape orders to the rights of housing and health in quite flexible terms.¹⁷ This emphasis on remedies, however, is not wholly convincing. As Tushnet himself points out in this part of his discussion, there is no obvious or necessary link between

¹² *Retail, Wholesale and Department Store Union, Local 580 v. Dolphin Delivery Ltd.*, [1986] 2 S.C.R. 573 [Dolphin Delivery].

¹³ *Retail, Wholesale and Department Store Union, Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156 [Pepsi-Cola]. *Dolphin Delivery*, *ibid.* and *Pepsi-Cola* both dealt with freedom of expression challenges under s. 2(b) of the *Charter* to the common law limits on secondary picketing in labour disputes.

¹⁴ Tushnet references articles about social and economic rights in Canada.

¹⁵ [1998] 1 S.C.R. 493 [Vriend].

¹⁶ [1997] 3 S.C.R. 624.

¹⁷ See *Government of the Republic of South Africa v. Grootboom* (2000), 11 B. Const. L.R. 1169 (S. Afr. C.C.), dealing with housing; *Minister of Health v. Treatment Action Campaign* (2002), 5 S. Afr. L.R. 721 (C.C.), dealing with the right to health care, and discussion of these cases at Tushnet, *Weak Courts, Strong Rights*, *supra* note 2 at 242-47.

strong-form judicial review on substantive constitutional issues and the use of what he terms “strong” or “weak” judicial remedies.

III. COMMENTS

Having set out the main threads of Tushnet’s argument in *Weak Courts, Strong Rights*, I wish to make four specific criticisms of the argument. Two of these comments go to aspects of Tushnet’s analysis of Canadian law. The third and fourth points go more generally to the thesis of the book.

First, while Tushnet’s account of Canadian *Charter* jurisprudence is detailed and nuanced, he misconstrues one aspect of that experience. In explaining why Canada employs weak-form constitutional review, he refers to ss. 1 and 33 of the *Charter*. These are also the crucial sections for the dialogue theory. In discussing the role of s. 1, he describes in the following terms the response available to a legislature after a court has ruled a statute to be unconstitutional and invalid: “How can the legislature respond? The s. 1 response is this: bolster the record supporting the legislation so that it provides a better — a more ‘demonstrable’ — justification for the statute’s scope.”¹⁸ This leads Tushnet to focus on a small number of cases in which Canadian legislators responded to an adverse judicial ruling with what he calls an “in-your-face” re-enactment of the impugned legislation.¹⁹ He implies that under *Charter* jurisprudence and practice, this is largely viewed as acceptable. In this he is wrong.

Peter W. Hogg and Allison A. Bushell Thornton, the authors of the article that originated the dialogue metaphor in Canadian constitutional theory,²⁰ made it clear that legislatures effectively have the last word in cases in which the judiciary has ruled a piece of legislation unconstitutional for failing the *proportionality* analysis under s. 1 of the *Charter*.²¹ In such instances, it is open to law-makers to enact amended legislation that meets the judge’s concerns while still achieving the original purpose of the law. In the more rare cases where a court rules that the very *purpose* of the law does not meet constitutional muster under s. 1,

¹⁸ Tushnet, *Weak Courts, Strong Rights*, *ibid.* at 32.

¹⁹ The principal instance Tushnet cites is the litigation surrounding the issue of whether a person accused of sexual assault has a right to access a complainant’s psychological counseling records. See *R. v. O’Connor*, [1995] 4 S.C.R. 411: a 5-4 majority of the Supreme Court of Canada ruled in favour of a broad right of disclosure. Parliament responded by amending the *Criminal Code*, R.S.C. 1985, c. C-46 as am. by *An Act to Amend the Criminal Code*, S.C. 1997, c. 30, to deny disclosure except under narrow conditions that tracked the opinion of the four dissenting Justices. In a subsequent challenge to the new legislation in *R. v. Mills*, [1999] 3 S.C.R. 668, the Court ruled it constitutional.

²⁰ Peter W. Hogg & Allison A. Bushell, “The *Charter* Dialogue Between Courts and Legislatures (Or Perhaps The *Charter of Rights* Isn’t Such A Bad Thing After All)” (1997) 35 *Osgoode Hall L.J.* 75. The authors revisited the issue ten years later, in Peter W. Hogg, Allison A. Bushell Thornton & Wade K. Wright, “*Charter* Dialogue Revisited — or ‘Much Ado About Metaphors’” (2007) 45 *Osgoode Hall L.J.* 1.

²¹ See *R. v. Oakes*, [1986] 1 S.C.R. 103, where the Supreme Court of Canada set out the test for justification under s. 1 of the limit on a *Charter* right that has been used ever since. The first step in the test asks whether the impugned legislation serves a social objective sufficiently “pressing and substantial” to justify the infringing of a *Charter* right. If the answer to that question is “yes,” the respondent must then show that the limit is “proportional,” in that (1) it is rationally connected to the objective; (2) it limits the right no more than is reasonably necessary to achieve the objective; and (3) that the beneficial effects of achieving the objective outweigh the deleterious effects on the right.

the legislature's options are much more limited. It may try a form of "in-your-face" response, but these instances have been few and not acknowledged as such by either courts or legislators. It is misleading to suggest that governments can have the last word merely by improving the evidentiary record and buttressing legislative objectives that were rejected by the judiciary the first time around.²²

Second, Tushnet concedes that weak-form review systems appear to drift toward becoming strong-form review systems, often over relatively short periods of time. If true, this seems fatal to his overall project. Tushnet believes it is true of Canada's experience with the *Charter*.²³ He notes that even though s. 33 of the *Charter* authorizes legislatures to have the final word, they have almost universally declined to employ it, and thus have effectively accepted that the judiciary should be the final arbiter on constitutional questions. In so doing, they accurately reflect the public's perspective and preference.

Like a number of Canadian commentators,²⁴ Tushnet regrets that s. 33 has gone into desuetude. He points to the Supreme Court's ruling in *Ford v. Quebec (A.G.)*²⁵ as the beginning of the end of the override experiment. There, the Supreme Court of Canada effectively removed all formal and substantive barriers to legislatures' ability to invoke s. 33. The Court did not require, for instance, that a legislature state clearly what rights it intended to override and why. Had it done so, Tushnet argues, s. 33 might have developed into a source of public discourse over constitutional rights. Instead it has become a dead letter, with legislators afraid to invoke s. 33 for fear of looking like they oppose *Charter* rights rather than merely disagreeing with judicial interpretations of those rights. This is a somewhat strained view of *Ford*, which is more easily understood as the Court's advising the public and the legislatures that it saw no basis for courts to intervene in the decision to employ the notwithstanding mechanism.

In describing the margin he envisages for weak-form review, Tushnet gives the impression of a tightrope artist at work:

The difficulty lies in creating a culture in which the courts' statements have *some* weight, but only because people believe that the courts' institutional characteristics increase the likelihood that the constitutional interpretations they offer are more reasonable than the reasonable ones offered by the government. If courts' judgments have more weight than that, one might as well adopt strong-form judicial review.²⁶

²² The difficulty legislatures generally face in this regard is perhaps best demonstrated in *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68, [2002] 3 S.C.R. 519. There, a majority of the Court found the stated legislative objectives of the law denying prisoners the right to vote in federal elections to be no more convincing than when first stated in an earlier case, with McLachlin C.J.C. famously stating in her majority opinion at para. 17, that the concept of dialogue between the courts and legislatures should not be reduced to the idea that "if at first you don't succeed, try, try again."

²³ Tushnet, *Weak Courts, Strong Rights*, *supra* note 2 at 43: "My discussions rely heavily on the more than twenty years of experience Canada has had with its system of judicial review, which I argue might be taken to exemplify the transformation of weak-form into strong-form review."

²⁴ See e.g. Tsvi Kahana, "Understanding the Notwithstanding Mechanism" (2002) 52:2 U.T.L.J. 221.
²⁵ [1988] 2 S.C.R. 712 [*Ford*].

²⁶ Tushnet, *Weak Courts, Strong Rights*, *supra* note 2 at 150 [emphasis in original].

Tushnet is right to suggest that the pronouncements of Canada's courts on constitutional matters count for more than this. They have considerable weight, and while room is left for legislative response, cases like *Vriend* and *Reference re Same-Sex Marriage*²⁷ show how leery elected politicians are merely to sidestep them. Tushnet may prefer a form of "constitutional advisory council," but that is a long way removed from the place high courts in Canada and other parliamentary jurisdictions currently occupy in their constitutional worlds.

Third, Tushnet's comparison of strong- and weak-form judicial review with respect to their contribution to social welfare interests leaves unanswered the question of whether weak-form review is better than no judicial review at all. After all, Tushnet's popular constitutionalism thesis is premised on the idea that courts are not natural allies of those seeking advances in social justice. Tushnet never states clearly what he means by "success" with respect to how legal systems address social and economic rights. That is, he does not state whether the goal is the substantive outcome of achieving a more just or equal society or the instantiation of social and economic rights in the legal system. These are not necessarily the same thing. It seems likely that Tushnet's project is ultimately intended to achieve social, not merely legal change. If that is so, then his argument is missing an important step: why does he believe that a greater involvement by the courts in addressing socio-economic issues will contribute to that outcome?

This question has acquired a greater urgency in Canada since the Supreme Court of Canada's decision in *Chaoulli v. Quebec (A.G.)*.²⁸ Tushnet is aware that the majority ruling in *Chaoulli* has been viewed as similar to the American's experience with *Lochner v. New York*²⁹ — that is, a demonstration that given its head in social policy matters, the judiciary is at least as likely to impose barriers to progressive legislative schemes as to require governments to enact them. In the *Chaoulli* case, the Court ruled invalid the prohibition against private insurance for services covered by public insurance in Quebec's medicare scheme, a measure intended to preserve the "single tier" public system. To his credit, Tushnet does not shirk from tackling this question.³⁰ He argues that the problem in *Chaoulli* was not the Court's willingness to engage with social policy under the terms of s. 7 of the *Charter*, but rather how it conceived the claim before it. Had the Court approached the case as if it was a challenge to wait-lists on the ground they violated a right to "decent health care," it might have focused more on the issue of alternatives to wait-lists. The Justices might then have also made a more creative remedial order, leaving it to the government of Quebec to identify the alternatives. Well, perhaps. This argument glosses over the fact that the petitioners in *Chaoulli* asked a clear question (is a prohibition on private health insurance

²⁷ 2004 SCC 79, [2004] 3 S.C.R. 698.

²⁸ 2005 SCC 35, [2005] 1 S.C.R. 791 [*Chaoulli*].

²⁹ 198 U.S. 45 (1905) [*Lochner*]. See Sujit Choudhry, "Worse than *Lochner*?" in Colleen M. Flood, Kent Roach & Lorne Sossin, eds., *Access to Care, Access to Justice: The Legal Debate Over Private Health Insurance in Canada* (Toronto: University of Toronto Press, 2005) 75. In the famous case of *Lochner*, a majority of the U.S. Supreme Court ruled that a restriction on bakers' maximum hours of work was unconstitutional for violating the right to contract freely implied by the due process clause of the 14th Amendment, *supra* note 9.

³⁰ For another and more persuasive approach to this challenge, see Jeff A. King, "Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision" (2006) 69 Mod. L. Rev. 631.

unconstitutional?) and deserved a clear answer. A majority of the Court chose to answer “yes.”³¹ This answer could only be given by judges confident that the *Charter* invites non-deferential judicial intervention in complex matters of social policy.

Fourth, Tushnet underrates the contribution that judicial decision-making makes to good constitutional thinking by law-makers and by the public. In his analysis of how to measure the performance of the Congress in interpreting the U.S. Constitution, he ultimately excludes from consideration instances subject to what he terms “judicial overhang,” that is, circumstances in which legislators are operating under the influence of past or impending judgments of the courts. That is why the two examples he examines of legislators’ constitutional performance are so rarified: the impeachment of President William J. Clinton, and the debate over war powers during the Kosovo conflict. This is a curiously abstract exercise. Even in those exceptional cases, jurisprudential themes and concepts surely formed a major part of the context for the law-makers’ deliberations. In the many other situations in which law-makers make decisions of constitutional import, they do so in a language imbued with ideas worked out, in, and through legal analysis.

The problem runs deeper than this, however. Tushnet’s thesis involves discounting the role of the judiciary in legal and constitutional interpretation generally. His argument that judges do not have a monopoly on “correct” answers to interpretive questions leads easily to the suggestion that one plausible argument is as good as any other plausible argument. This is the fallacy of which lawyers in the administration of President George W. Bush have taken advantage in giving legal opinions to support aggressive and novel administration positions on such issues as torture and executive powers in the war on terror. American courts, including the Supreme Court in a series of cases dealing with detention and hearing rights of “enemy combatants” held at Guantanamo Bay, have engaged in an impressive pushback on these fronts.³² In short, this is a bad historical moment to be making the case that elected officials (and their legal advisors) do an equally good job of interpreting constitutional norms as do courts.³³ No doubt politicians have the ability to identify and apply constitutional norms, but they are also prone to manipulating those norms in pursuit of a

³¹ To be precise, three of the four Justice majority ruled the prohibition unconstitutional for violating s. 7 of the *Charter*, *supra* note 4. Justice Deschamps based her ruling solely on s. 9.1 of Quebec’s *Charter of Human Rights and Freedoms*, R.S.Q., c. C-12.

³² See *Boumediene v. Bush (President of the United States)*, 128 S. Ct. 640 (2008), most recently decided on 12 June 2008, in which by a 5-4 majority the Court ruled that aliens held as enemy combatants have a right to seek habeas corpus in Federal Court. See also *Rasul v. Bush (President of the United States)*, 542 U.S. 466 (2004) [*Rasul*] (enemy combatants held outside the U.S. in Guantanamo Bay have a right to a file for habeas corpus review); *Hamdan v. Rumsfeld (Secretary of Defense)*, 548 U.S. 557 (2006) (legislation passed subsequent to the *Rasul* decision to deny habeas corpus review was not effective against those who had filed for review prior to the legislation).

³³ Tushnet acknowledges this problem in a discussion of the performance of the Office of Legal Counsel (OLC) under the Bush Administration with respect to the “torture memos” produced by the OLC. He agrees that this episode seems to show a predisposition by the OLC to give opinions supporting the President’s political wishes, but does so in muted tones. See Tushnet, *Weak Courts, Strong Rights*, *supra* note 2 at 138-39 [footnotes omitted]:

There rarely exist independent criteria by which to assess whether the OLC’s position is ‘correct’ in some ultimate sense. Nevertheless, the near absence of judicial intervention [on questions of executive power] renders difficult, if not impossible, a direct comparison of the OLC’s performance as an interpreter of the Constitution with that of the courts. All that may be said is that in this particular area the OLC has incentives that push it away from disinterestedness.”

distinct constitutional agenda. When they do so, the judiciary's particular commitment to a continuity of interpretation is most tested and most needed.

Weak Courts, Strong Rights makes a provocative contribution to the ongoing debate concerning the legitimacy of constitutional review by the judiciary. It does so in a way that shows, as Tushnet intended, how a comparative approach can enrich that debate. The debate may further be enriched by considering that judicial legitimacy can be founded not so much on whether courts do or do not have the last word, but rather on the appropriateness of taking their unique contribution to the common discourse about constitutional values seriously.

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